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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 787 OF 2003

Shankar Bhima Jadhav ... Appellant

V/s

The State of Maharashtra ... Respondent

Shri Kiran Kandpile with N.D. Shinde for the appellant accused.

Dr. F.R. Shaikh, A.P.P. for the respondent State.

CORAM: D. G. DESHPANDE &
SMT. NISHITA MHATRE, JJ.

DATED: 16TH APRIL, 2007.

ORAL JUDGMENT (PER SMT. MHATRE, J.):

1. The appellant has challenged the judgment and order of the IV Additional Sessions Judge, Pandharpur, dated 9.5.2003. By this judgment and order, the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code. He has been sentenced to suffer life imprisonment and payment of fine of Rs.100/-.

2. The case of the prosecution is that, the accused constantly ill-treated the victim who was his wife. He often beat her when she asked for money for domestic

expenses. On 4.1.1998, the accused was annoyed that the victim had cooked only vegetarian food and there was no non-vegetarian dish for that meal. When he questioned the victim, she explained that it was because he had given her insufficient money for the household expenses and, therefore, it was not possible to entertain his request for non-vegetarian food. Incensed by this, the accused flung a burning oil lamp on the victim. Her clothes caught fire and the victim shouted out loudly. Her mother who has been examined as PW-4 came running to her hut and doused the fire. The victim's mother saw the accused running away from the spot. The victim was removed to the hospital where her statement was recorded at 12.15 am on 5.1.1998 by the police constable. This statement has been treated as an F.I.R. Thereafter another statement was recorded at 2.55 am by the police officer. The victim had suffered 74% burn injuries. She succumbed to these injuries on 6.1.1998. The accused was arrested and was charged for having murdered his wife. The trial of the accused was committed to Sessions. The Sessions Court has found that the victim died a homicidal death and that the accused had killed her by setting her on fire. The Sessions Court, therefore, convicted and sentenced the accused as aforesaid.

3. The prosecution has relied on the testimony of 9 witnesses, besides the two dying declarations of the deceased. PW-1 is the panch witness who has proved the inquest panchanama. PW-2 has proved the spot panchanama. He has stated that burnt pieces of the saree and blouse were found in the hut where the accused and the victim resided. An oil lamp with its upper part separated from the rest of the body was also found. The lamp contained some kerosene. The oil lamp and the burnt pieces of clothing found in the premises, were seized by the police according to this witness.

4. PW-3 is the P.S.I. who was then attached to the Mangalwedha police station. He was directed to the hospital after the victim was admitted in a burnt condition. This witness has recorded the dying declaration which is at Exh.15 and is the first statement of the victim. He has recorded the statement of the victim after taking all the necessary precautions and obtaining the opinion of the medical officer on duty that the victim was in a position to have her statement recorded. The statement has been treated as the F.I.R. in this case.

5. The next witness examined by the prosecution is the victim’s mother PW-4. She has spoken about the

ill-treatment meted out to her daughter by the accused after he consumed liquor. This witness has stated that she lived near her daughter's house and that as soon as she heard the victim's cries, she ran to the latter's house. She saw the accused running away from the spot of the incident. The witness claims to have extinguished the fire by dousing the flames with water. Two other relatives of the victim also followed her when they heard the victim's cry. The witness has spoken of an oral dying declaration made to her by the victim. She has also narrated that two police constables had recorded the victim's statements after the victim's relatives had left the room. This witness has denied the suggestion made to her that she had not seen the accused running away from the spot.

6. PW-5 is the panch of the Wadar community to which the accused and the victim belonged. He has spoken about the complaints being made to the panchayat about the drinking habits of the accused and the consequential ill-treatment to the victim by the accused. The prosecution has examined as PW-6, the uncle of the victim who was present in the house of PW-4 when the incident occurred. He has corroborated the deposition of the PW-4. He has also mentioned that the victim had informed him the reason as to why the accused had set

her on fire.

7. The prosecution has then examined the doctor who was present when the statements of the victim were recorded. He has stated that the statements were recorded only after he had certified that she was mentally fit to have her statement recorded. He has endorsed the dying declaration which is at Exh.15 accordingly.

8. The next witness, PW-8 is another police official who was on duty in the Civil Hospital at Solapur. This witness has recorded the second dying declaration of the victim at about 2.55 am, after ascertaining from the medical officer, PW-2 that the victim was in a position to have her statement recorded.

9. The investigating officer has been examined as PW-9. This witness has drawn up the inquest and spot panchanamas. He has proved the seizure of the articles from the hut of the accused. He has also sent the articles for chemical analysis and filed the reports drawn by the chemical analyzer.

10. The main contention of the advocate for the accused is that there is an inconsistency in the dying declarations recorded which are at Exhs. 15 and 28. He

submits that, while Exh.15 is detailed and mentions several other factors, the victim had merely stated in Exh.28 that her husband set her on fire after he was intoxicated. This, according to the learned advocate for the accused, fatally affects the case of the prosecution. Apart from this, he submits that, in the event it is held that the death of the victim was homicidal and could be attributed to the accused, there was no intention on the part of the accused to kill the victim. The learned advocate also submits that the conviction under Section 302 of the Indian Penal code be set aside and the sentence be reduced to Section 304 Part II of the Indian Penal Code. He then urges that the quantity of kerosene contained in the oil lamp was minimal and could not have been more than 50 ml. He submits that the oil lamp which was found at the scene of the offence contained some kerosene and, therefore, only a few drops of kerosene might have fallen on the victim. This fact, according to the learned advocate, indicates that the accused had no intention to kill his wife.

11. A perusal of the two dying declarations indicates that on 4.1.1998 at about 9.00 pm. the victim with her four children were in the house when the accused returned in an inebriated condition. He was upset with

the kind of food served to him by the victim and demanded that she serve non-vegetarian food. The victim told him that it was impossible to do so as the money given by him for household expenses was inadequate. Irked by this reply of the victim, the accused had thrown the lighted oil lamp on the victim. The clothes of the victim caught fire and she was soon ablaze. She has spoken about her mother reaching her place after hearing her cries. She has also mentioned in the first dying declaration that her mother extinguished the fire after which she was taken to the hospital. Although as mentioned earlier the second dying declaration is not as detailed as the first, both the dying declarations are consistent. Both the statements mention the role played by the accused and, therefore, we concur with the view taken by the Sessions Court that the victim's death was homicidal and that the accused was responsible for the burn injuries sustained by her. We find no reason to discard the dying declarations which are at Exhs. 15 and 28. They have been recorded by PW-4 and PW-8 respectively after obtaining the opinion of the doctor on duty. PW-7 has, in fact, endorsed the dying declaration which is at Exh. 15. The second dying declaration has also been recorded after obtaining doctor's permission and opinion. This declaration has been endorsed by the medical officer of the Civil

Hospital at Solapur, however, he has not been examined before the Court. Besides, the victim has also disclosed to PW-4 and PW-6 when they found her ablaze that the accused had set her on fire because she did not serve him any non-vegetarian food.

12. The chemical analyzer's reports indicate that kerosene residue was found on the clothes of the victim. She was wearing a polyester saree which obviously caught fire once the lighted oil lamp was thrown on her. These reports corroborate the dying declarations of the victim.

13. In our opinion, therefore, there is no reason to differ with the findings recorded by the Sessions Court that the victim died due to homicidal burns caused by her husband, the accused in the present case.

14. We agree with the submission of the learned advocate for the accused that the conviction if at all, should be under Section 304 Part II and not under Section 302 of the Indian Penal Code. It is obvious from the evidence on record that the accused did ill-treat the victim. However, there is no evidence on record to indicate that he had any intention to kill her. Taking into consideration the quantity of kerosene

used, it is apparent that although the accused had knowledge that his act would lead to the victim's death, there was no intention on his part to kill her.

15. In the case of **Hari Shankar v/s State of Rajasthan, reported in A.I.R. 1999 SC 2629,** the Supreme Court was dealing with a case where there was proof that there was an altercation between the accused and the victim. The accused had thrown a burning kerosene wick stove on the deceased and was aware that such an act would be likely to cause burns resulting in death. However, in the facts and circumstances of the case, the Supreme Court has convicted the accused under Section 304 Part II of the Indian Penal Code instead of under Section 302 of the Indian Penal code. Similarly, in the case of **Sadashiv Dhondiram Pandit v/s State of Maharashtra, reported in 2000 Cri.L.J. 4880,** a Division Bench of this Court considered a case where a couple had been married for a long time. The husband came home under influence of liquor and demanded the victim's Mangalsutra. On her refusal to acceede to his demand, he set her ablaze by pouring kerosene on her. He then doused the flames with water and ran away. The Division Bench of this court held in the factual matrix before them, that the case was of an offence punishable under Section 304 Part II and not under Section 302 of the

Indian Penal Code. In the case of **Bhimrao Harbaji Gedam v/s State of Maharashtra, reported in 2001 Cri.L.J. 4920,** another Division Bench of this Court set aside the conviction under Section 302 of the husband who had in a fit of anger set his wife ablaze by pouring kerosene. He had then attempted to put out the fire and sustained burns while doing so. The Division Bench held that the offence was one of culpable homicide not amounting to murder. In **Criminal Appeal No. 1211 of 2002 decided on 17th October, 2006,** the Division Bench of this Court, to which one of us (Smt. Mhatre, J.) was a party, has altered the conviction under Section 302 of a husband who had set his wife ablaze after she was unable to fulfil his demand for a particular vegetable for dinner. The conviction and sentence under Section 302 was set aside and instead the accused was convicted under Section 304 Part II.

16. In the facts and circumstances of the present case we find that the intention on the part of the accused to kill his wife has not been established by the prosecution. In our opinion, therefore, this is a case where the accused has committed culpable homicide not amounting to murder.

17. We, therefore, find that we are unable to agree

with the Sessions Court and convict the accused under Section 302 of the Indian Penal Code.

18. Hence, the appeal is partly allowed on the following terms:

(i) The conviction of the accused and sentence under Section 302 of the Indian Penal code is set aside.

(ii) The accused is instead convicted under Section 304 Part II of the Indian Penal Code and sentenced to suffer imprisonment for seven years.

(iii) In the event the accused has already undergone this sentence, the accused shall be set free if not otherwise required.

(D.G. DESHPANDE, J.)

(SMT. NISHITA MHATRE, J.)